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No. 80-121

In the Supreme Court of the United States

OCTOBER TERM, 1979

OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION LOCAL 28, AFL-CIO, PETITIONER

v.

MIDWEST STOCK EXCHANGE, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

WILLIAM A. LUBBERS
General Counsel
National Labor Relations Board
Washington, D.C. 20570

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1. Petitioner won a representation election among the private respondent's ("the Company") office and clerical employees. The Company filed objections, alleging, *inter alia*, that Jonathan James, one of petitioner's election observers, engaged in improper conversations in and away from the voting area. A hearing was held, and the hearing officer made findings and recommended overruling the objections (Pet. App. 23a-34a). The Board adopted these findings and recommendation (*id.* at 21a-22a).

The evidence showed that James engaged in various conversations in the voting area, two of which lasted about five minutes.[1] The hearing officer concluded, however, that James' conduct did not come within the prohibition of *Milchem, Inc.*, 170 N.L.R.B. 362 (1968), concerning conversations between agents of parties and voters waiting to cast their ballots.[2]

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[1] The hearing officer found (Pet. App. 27a):

> * * * James became involved in several exchanges with voters which progressed beyond mere greetings. Indeed, James even initiated some of the conversations. His activity was noticed by Board Agent Walter Hoffman, who cautioned James more than once to "cut his conversation short." Hoffman estimated that on perhaps six occasions he had to remind James that he could not go beyond greetings with voters. However, not every one of these warnings was prompted by James' actually having overstepped the bounds. In response to one caution from Hoffman to restrict conversation, James told Hoffman that he did not think he could do as requested, since it would be impolite not to speak to his friends. There is no evidence suggesting that the subject of the election, the Union, or the Employer's position was discussed during any of these conversations between James and voters in line.

[2] In *Milchem*, the Board set aside an election where a union agent spent "several minutes," "perhaps five minutes" (170 N.L.R.B. at 363) in the polling area talking to prospective voters about "the weather and like topics" (*id.* at 362). The Board held that "the sustained conversation with prospective voters waiting to cast their ballots, regardless of the content of the remarks exchanged, constitutes conduct which, in itself, necessitates a second election" (*ibid.*). The Board added (*id.* at 363):

> We intend, of course, that our application of this rule will be informed by a sense of realism. The rule contemplates that conversations between a party and voters while the latter are in a polling area awaiting to vote will normally, upon the filing of proper objections, be deemed prejudicial without investigation into the content of the remarks. But this does not mean that any chance, isolated, innocuous comment or inquiry by an employer or union official to a voter will necessarily void the election. We

The hearing officer found that the conversations were "not prolonged" and amounted to an "exchange of pleasantries" and "friendly banter" (Pet. App. 31a-32a). Thus, the hearing officer concluded (*id.* at 31a):

> Even though James spoke to voters in the corridor to an extent beyond a mere exchange of greetings, the mild nature of his activity holds it outside the bounds of the *Milchem* proscription. I conclude that it is not sufficient to warrant setting aside the election.

The Board certified petitioner as bargaining representative. When the Company refused to bargain, the Board, on summary judgment, found that the Company had committed an unfair labor practice in violation of Sections 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1) (Pet. App. 11a-20a).

2. The court of appeals denied enforcement, concluding that this case could not be distinguished from *Milchem, supra.* The court stated (Pet. App. 8a-9a):

> though the Board in *Milchem* did not attempt to designate the transition point between a "trifling" comment and a "prolonged" conversation, it unquestionably concluded that a five minute conversation falls within the latter category. The Board has failed to explain to this Court's satisfaction how a five minute conversation can be prolonged in one instance and not prolonged in another. In the

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will be guided by the maxim that "the law does not concern itself with trifles." We trust, however, that the parties to the elections, in order to obviate the sometimes troublesome task of defining what is to be considered trifling, will take pains to assure complete compliance with the rule by instructing their agents, officials, and representatives simply to refrain from conversing with prospective voters in the polling area.

absence of a Board announcement of a change in the *Milchem* standard and its reason for the change (the Board does not contend that it has overruled *Milchem*), it is our judgment that the Board misapplied its established rule.

The court stressed that it was not passing on "the wisdom of the *Milchem* rule" (Pet. App. 10a).

3. While the Board believes that the court of appeals erred in rejecting the finding that James' conversations did not require setting aside the election, it did not file its own petition because it viewed the disagreement between the Board and the court as presenting only the issue of application of the established *Milchem* principles to the particular facts here. This Court has indicated that it will not ordinarily review such an issue. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951). However, should the petition be granted, the Board will defend its decision and order.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

WILLIAM A. LUBBERS
General Counsel
National Labor Relations Board

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